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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

GERALD A. KLEIN, Plaintiff and Appellant, v. COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY et al., Defendants and Respondents.	G032614 (Super. Ct. No. 01CC16416) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven L. Perk, Judge. Reversed and remanded.

Klein & Wilson, Mark B. Wilson, and Gerald A. Klein for Plaintiff and Appellant.

Coldwell Banker Residential Brokerage Co., Richard Gould; Newmeyer & Dillion, and Shawn E. Cowles for Defendants and Respondents.

* * *

Gerald A. Klein (plaintiff) appeals from a summary judgment entered in favor of Coldwell Banker Residential Brokerage Company (Coldwell Banker) and

Deborah Cowles (collectively defendants, except where individual identification is necessary), in an action based on an alleged fraudulent concealment conspiracy arising out of plaintiff's purchase of a residence. Plaintiff contends a jury should have been allowed to decide whether defendants conspired to conceal certain appraisal information material to plaintiff in going forward with the transaction.

The outcome of this case is entirely dependent upon whether the court was correct in finding inadmissible a single document, "the Harper letter," — the *only* evidence of the alleged concealment conspiracy. As plaintiff conceded at oral argument, "This comes down to the Harper letter. I don't get the Harper letter in evidence, I lose. That is clear."[1]

We conclude the court erred in excluding the Harper letter. Although it was clearly hearsay evidence, it was admissible as an inconsistent statement. (Evid. Code, § 1235; all further statutory references are to the Evidence Code unless otherwise stated.) The Harper letter created a triable issue of material fact regarding the alleged conspiracy to fraudulently conceal from plaintiff certain appraisal information regarding the value of the property.

In reversing the judgment, we reject defendants' argument that the conspiracy is irrelevant because defendants owed no duty to plaintiff to disclose the information, and therefore did not commit the underlying wrongful act. Defendants fail to distinguish between nondisclosure and active concealment. It is true that liability for failure to disclose generally rests upon a fiduciary duty of disclosure, a duty defendants did not owe to plaintiff. But it is also true that active concealment or suppression of facts

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[1] Plaintiff made a like remark in argument at the trial court, stating, "That brings us to the Cindy Harper letter. I will concede without the Harper letter, there is nothing here. I played no games. I have admitted all the facts. This comes down to the Harper letter."

by a nonfiduciary under the circumstances alleged here can constitute actual fraud, requiring no fiduciary or confidential relationship.

Our rejection of the duty argument and defendants' other assertions regarding the elements of the underlying tort are discussed, *post*. We find no basis on which the summary judgment can be justified. It must be reversed and the case remanded for further proceedings.

FACTS

In July 2001, real estate agent Joan Norris, with Pickford Realty, Inc., and Prudential California Realty (collectively, Prudential) represented plaintiff, a Newport Beach attorney, in his effort to purchase a detached residence on a large corner lot (the Castellina property) in the guard-gated Strada development of Newport Coast. Plaintiff and his wife had wanted to buy the Castellina property for more than two years. When it came on the market, but had not yet been placed on the multiple listing service, Norris conveyed plaintiff's offer of $1.25 million to defendants, but the seller stood firm on the listed price of $1.35 million. Plaintiff agreed to pay $1.35 million, "'contingent upon [the] property appraising at no less than the specified purchase price.'"

To secure quick financing, plaintiff contacted two lenders to compete against each other for the loan — First Capital Corporation of Los Angeles (First Capital) and Nationwide Lending (Nationwide). Generally, residential property must appraise for its purchase price before a lender will commit to provide a home loan. Plaintiff wrote checks for two appraisals, one with First Capital, the other with Nationwide.

Neither First Capital's initial appraiser, Rex Dungan, nor his replacement, Rick Searfoss, completed an appraisal. Indeed, Searfoss's work-in-progress came to a halt when Nationwide won the race: On August 6, 2001, its appraiser, William Walsh, submitted his report identifying comparable properties which had sold for prices ranging

from $1.3 million to $1.74 million, and appraising the Castellina property at $1.35 million. The contingency provision having been met, plaintiff signed the loan documents.

In preparation for the close of escrow, First Capital's loan officer, Cindy Harper, submitted a request seeking reimbursement for a $200 "appraisal 'cancellation' charge" regarding Searfoss's work. When plaintiff reviewed the closing documents, he was outraged and wrote an angry letter to Harper, saying he had no idea why First Capital had retained a second appraiser, and he would not authorize payment of the bill. In response, on August 23, 2001, Harper, attempting to justify the expense, wrote to plaintiff (the Harper letter). She explained that when Dungan's preliminary opinion had come in below $1.35 million, First Capital had turned to Searfoss for another opinion. Searfoss purportedly also thought the Castellina property was worth "about $1,200,000." Harper said both the seller's agent (Cowles) *and* plaintiff's own agent (Norris) had asked her not to tell plaintiff about the low appraisals because "[they] were afraid you were going to ask for a reduction in sales price, which would cause the sale to be cancelled."

Plaintiff decided to go ahead with the deal. He alleged, "Unfortunately for Plaintiff, by the time Plaintiff received Harper's letter, it was too late for him to stop escrow from closing without serious financial consequences. . . . [Plaintiff] had already signed all escrow documents, including a loan commitment, and agreed to pay the lender over $25,000 in points as well as additional closing costs. [¶] . . . [Plaintiff] no longer had an option to terminate escrow and, if he tried to do so, he would be sued by the seller, the lender, the brokers, and possibly others."

On December 26, 2001, after taking possession of the Castellina property, plaintiff filed a verified complaint against Prudential, Norris, First Capital and Harper, alleging breach of fiduciary duty, concealment, breach of contract, unjust enrichment, and intentional infliction of emotional distress, based on the defendants' failure to disclose Dungan's and Searfoss's opinions regarding the value of the Castellina property.

Obtaining a $120,000 settlement from those defendants, in July 2002, plaintiff pursued the seller's agents, defendants Coldwell Banker and Cowles, in the claim underlying this appeal — a single cause of action for a conspiracy of fraudulent concealment. The sole evidence of the alleged conspiracy was the Harper letter. Defendants objected to that evidence as, inter alia, hearsay to which no exception applied.[2] Sustaining the objections, the court determined there were no triable issues of material fact as to the requisite elements of the underlying tort and granted the motion for summary judgment.

DISCUSSION

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Under Code of Civil Procedure section 437c, subdivision (o)(1), a defendant moving for summary judgment need show only "'that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 853.) The defendant carries that burden either by "present[ing] evidence that conclusively negates an element of the plaintiff's cause of action," or by "present[ing] evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence [to establish the requisite

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[2] Defendants served up a smorgasbord of other objections, including lack of foundation, speculation, the best evidence rule, vague and ambiguous, calls for expert opinion, and assumes facts not in evidence. As pertaining to the Harper letter, these objections are frivolous, and we assume the trial court would have recognized them as such. The Harper letter was offered only to prove plaintiff's agent and defendants asked Harper to conceal from plaintiff that two appraisals had come in below the selling price. We will thus presume the court sustained only the hearsay objection, and we will devote our legal discussion of evidentiary objections, *post*, solely to that issue.

element]." (*Id.* at p. 855.) "Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. [Citations.] . . . If the plaintiff makes such a showing, summary judgment should be denied." (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 889.) Summary judgment is improper if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 850.) We conduct a de novo review (*Reliance Nat. Indemnity Co. v. General Star Indemnity Co*. (1999) 72 Cal.App.4th 1063, 1074), affirming a summary judgment "if it is correct on any ground, regardless of the trial court's stated reasons." (*JEM Enterprises v. Washington Mutual Bank* (2002) 99 Cal.App.4th 638, 644.)

In accordance with these principles, we conclude summary judgment was improvidently granted. Plaintiff's sole theory of recovery was that defendants conspired with plaintiff's agents to conceal and prevent plaintiff from discovering two appraisal opinions valuing the Castellina property at approximately $125,000 less than its purchase price. Plaintiff presented the Harper letter as evidence of the concealment conspiracy. The court should not have excluded that evidence.

Admissibility of the Harper Letter

The hearsay rule, section 1200, subdivision (a), provides in pertinent part, "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." The Harper letter is evidence of an out-of-court statement made by Harper. It was offered to prove a concealment conspiracy, i.e., that defendants and plaintiff's own agent asked Harper to conceal from plaintiff that two appraisers had valued the property at below the selling price, so that plaintiff would not walk away from the transaction. The

Harper letter, offered to prove the truth of the matter stated, i.e., that defendants and plaintiff's agent had made the collusive request to conceal this information, is clearly hearsay.

Section 1200, subdivision (b) makes hearsay inadmissible with certain statutory exceptions. Plaintiff argues several of those exceptions, but we find only one applicable. Under section 1235, hearsay is admissible "if the statement is inconsistent with [the declarant's] testimony at the hearing and is offered in compliance with Section 770." Compliance with section 770, in turn, requires that the declarant be "so examined while testifying as to give him [or her] an opportunity to explain or to deny the statement." (§ 770, subd. (a).) Here, Harper's deposition was taken, she was so examined as to be given the opportunity to explain or deny her statement in the letter regarding the concealment conspiracy, and the statement in the letter was inconsistent with her deposition testimony, a transcript of which was submitted in opposition to the summary judgment motion. To wit, when asked directly whether it was true, as stated in the letter, that she was asked by both plaintiff's agent and defendants not to tell plaintiff about the low ball appraisals, Harper responded, "I wasn't asked by both agents, no." Asked to explain why she wrote that both agents had been involved, she stated, "Because both agents were afraid if the value came in lower, so I said 'both agents' when I should have just said 'one agent' on the next line." Without question, the Harper letter was admissible under section 1235's inconsistent statement exception to the hearsay rule.

Conspiracy

Defendants contend that even if the Harper letter was admissible, it does not create a triable issue of material fact because, as a matter of law, they are not liable on the underlying cause of action for fraudulent concealment. As we now discuss, the argument is flawed.

It is true that "[c]onspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514.) In other words, a civil conspiracy gives rise to a cause of action *only* if (1) an underlying civil wrong has been committed resulting in damage, and (2) the alleged conspirator was "personally bound by the duty violated by the wrongdoing." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 (*Doctors' Co.*).)[3]

Fraudulent Concealment

The above leads to the question of whether defendants were personally bound by a duty violated by the instruction to Harper that she hide the appraisal information from plaintiff. If they were not bound, they cannot be liable for conspiracy.

Defendants argue they owed plaintiff no duty of disclosure because they were not in a fiduciary relationship with him. (See, e.g., Civ. Code, § 1710, subd. (3); *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 ["[t]he general rule for liability for nondisclosure is that even if material facts are known to one party and not the other, failure to disclose those facts is not actionable fraud unless there is some fiduciary or confidential relationship giving rise to a duty to disclose"].) But this is a purely academic response, not an answer, because according to the Harper

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[3] In *Doctors' Co.*, the Court of Appeal issued a peremptory writ of mandate directing the superior court to enter an order sustaining the demurrers of two attorneys and a medical expert to plaintiff's cause of action for conspiracy with the insurer to deprive plaintiff of the benefits of Insurance Code section 790.03, subdivision (h)(5) (insurer's duty to attempt good faith settlement of claim where liability has become reasonably clear). The attorneys and expert were "act[ing] solely as the insurer's agents and did not personally share the statutory duty alleged to have been violated." (*Doctors' Co., supra,* 49 Cal.3d at p. 49.)

letter, the case here was for active concealment, *not* passive nondisclosure. That is, defendants took affirmative steps to keep plaintiff from discovering the low appraisals: They *told* Harper not to tell plaintiff.

Under *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, such conduct relating to a transaction exposes the actor to liability. As stated by our Supreme Court, "In *transactions* which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: . . . (3) the defendant actively conceals discovery from the plaintiff." (*Id.* at p. 294, italics added; *La Jolla Village Homeowners' Assn. v. Superior Court, supra,* 212 Cal.App.3d 1131, 1151 ["active concealment of facts . . . may under certain circumstances be actionable without [a fiduciary or confidential] relationship"]; *Stevens v. Superior Court* (1986) 180 Cal.App.3d 605, 608-609 ["It is, however, established by statute that intentional concealment of a material fact is an alternative form of fraud and deceit equivalent to direct affirmative misrepresentation"]; *Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 37 ["An active concealment has the same force and effect as a representation which is positive in form"]; *Sime v. Malouf* (1949) 95 Cal.App.2d 82, 99 [without regard to a fiduciary relationship, defendants' intentional concealment of material facts constituted actionable fraud].)

For example, in *Stevens v. Superior Court, supra,* 180 Cal.App.3d at p. 607, plaintiff successfully pleaded a cause of action for actual fraud in alleging defendant "intentionally concealed from the plaintiff . . . that foreign physicians, unlicensed to practice medicine in California, were authorized by the hospital to function as hospital staff physicians and surgeons on a daily basis without the supervision required by statute." *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498 further illustrates the point. There, the pleadings showed "defendants orchestrated a scheme to deprive [plaintiff] of his insurance benefits, and . . . part of this scheme was to lead [plaintiff] to believe that he was going to receive a physical examination while concealing from him a material fact,

i.e., that by prearrangement between defendants the examination was to be dishonest and produce a false report of plaintiff's condition." (*Id.* at pp. 512-513.) The defendant's agents, hired by the insurer to set up plaintiff's examination with a health care professional they knew would cooperate in the scheme, were *not* subject to liability on a constructive fraud claim resting on a fiduciary duty owed only by the insurer. But they *were* subject to liability for false misrepresentation in that they *actively concealed* from plaintiff that the examining doctor had agreed in advance to render a false report justifying the insurer's denial of benefits. The *Younan* court observed, "The law imposes the obligation that every person is bound . . . to abstain from injuring the person or property of another, or infringing upon any of his [or her] rights," (*id*. at p. 511), and "[a]lthough mere nondisclosure is not ordinarily actionable unless the defendant is a fiduciary with a duty to disclose, active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation, i.e., *actual fraud*." (*Id.* at p. 512.) Our Supreme Court has cited *Younan* with approval in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra,* 7 Cal.4th at pages 512-513, and *Doctors' Co., supra,* 49 Cal.3d at page 48.

Neither the rule of law stated in the foregoing cases nor its applicability here can be gainsaid. The Harper letter, if true, gives rise to the inference that defendants took steps to prevent plaintiff from discovering the appraisal information from the only other person in possession of that information who also had a relationship with plaintiff, i.e., his loan officer, Harper. Under the principles summarized, *ante*, although defendants were not in a fiduciary or confidential relationship with plaintiff and thus owed him no duty of disclosure, they were involved in a transaction with him, giving rise to their personal, nonfiduciary duty to refrain from harming him by *actively concealing and preventing plaintiff from discovering* the fact that First Capital's appraisers had said the property was not worth $1.35 million.

Having dispensed with the issue of duty, we turn our analysis to the remaining disputed elements of plaintiff's claim for fraudulent concealment — materiality of the concealed matter, plaintiff's unawareness of the fact, and damages.

Materiality

Defendants assert that the concealed information was not material. That argument depends on materiality in a narrow sense, with relation to a real estate agent's duty to disclose facts affecting the value of the property. (See, e.g., Civ. Code, § 2079, subd. (a); *Pagano v. Krohn* (1997) 60 Cal.App.4th 1, 12; *Sweat v. Hollister* (1995) 37 Cal.App.4th 603, 608-609.) In the context here, however, materiality must be understood in the broader sense. That is, the concealed fact is that there were low appraisals. That fact clearly is material to the transaction itself because, as an essential condition precedent to his agreement to purchase the property, plaintiff required an appraisal equal to the $1.35 million selling price. Defendants knew he would not go forward without such an appraisal. Whether plaintiff would have canceled the purchase upon learning of the low appraisals, or instead would have awaited the Nationwide appraisal and gone forward when it was received, is a question properly reserved for the trier of fact.

Imputed Knowledge

Defendants argue plaintiff cannot claim to have been unaware of the concealed fact because, as a matter of law, his own agent's knowledge is imputed to him. *Sands v. Eagle Oil & Refining Co.* (1948) 83 Cal.App.2d 312, squarely defeats that proposition. It states, "It is true that in general the knowledge of an agent which he is under a duty to disclose to his principal or to another agent of the principal, is to be imputed to the principal. [Citations.] However, this rule is not without exceptions pertinent to this case. One is that *if the agent and the third party act in collusion against the principal the principal will not be held bound by the knowledge of the agent*.

[Citation.] Another excludes application of the general rule *when the third party knows that the agent will not advise the principal*." (*Id.* at p. 319, italics added.) The *Sands* court goes on to quote the United States Supreme Court's decision in *Mutual L. Ins. Co. v. Hilton-Green* (1916) 241 U.S. 613, 622-623, as follows: "'The general rule which imputes an agent's knowledge to the principal is well established. The underlying reason for it is that an *innocent third party* may properly presume the agent will perform his duty and report all facts which affect the principal's interest. But this general rule does *not* apply *when the third party knows there is no foundation for the ordinary presumption*, — *when he is acquainted with circumstances plainly indicating that the agent will not advise his principal*. The rule is intended to protect those who exercise good faith, and not as a shield for unfair dealings.'" (*Sands v. Eagle Oil & Refining Co., supra,* 83 Cal.App.2d at pp. 319-320, italics added; see also, *Imperial Finance Corp. v. Finance Factors Ltd.* (Hawaii 1971) 490 P.2d 662, 664.) In short, in light of the admissible evidence — the Harper letter — submitted by plaintiff in opposition to the motion for summary judgment, there were triable issues of material fact as to whether defendants conspired to conceal the low appraisal information from plaintiff and knew plaintiff's agent would not communicate the information to plaintiff. For that reason, there are triable issues of fact regarding the element of imputed knowledge.

Damages

Defendants contend plaintiff suffered no damages. As the moving parties, defendants had a burden to present evidence either (1) conclusively negating the claim for damages, or (2) showing that plaintiff did not possess or could not obtain the necessary evidence to establish damages. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 853, 855.) Defendants did neither; indeed, their moving separate statement of undisputed material facts makes no mention of damages. As a result, the burden never

shifted to plaintiff to make out a case for damages. Thus, triable issues of fact remain for trial.

CONCLUSION

The judgment is reversed. The case is remanded for further proceedings. Plaintiff shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.